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Supreme Court of the United States

OCTOBER TERM, A. D., 1947

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No. -----

CLAY RICE ET AL., PETITIONERS,

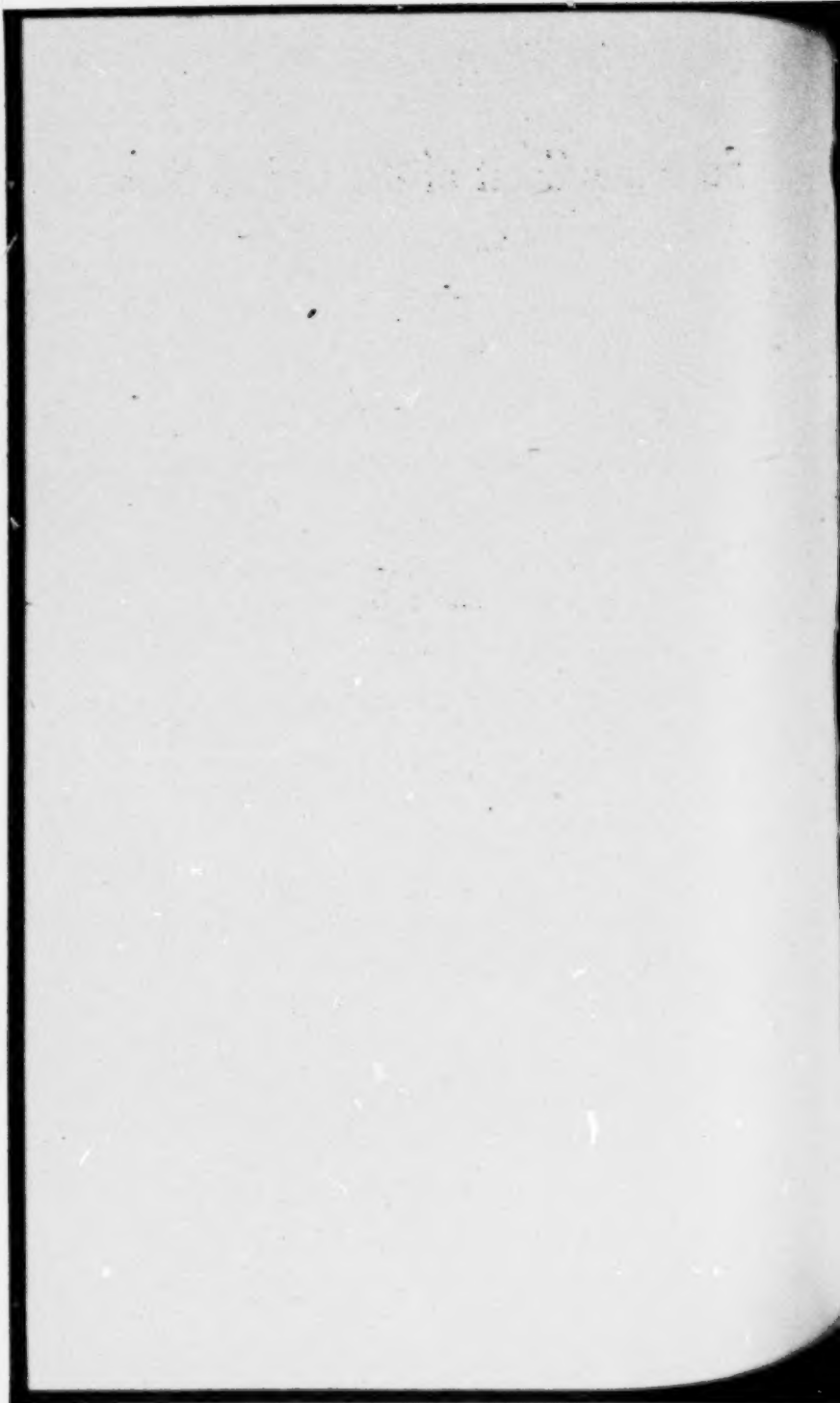
versus

GEORGE ELMORE, ON BEHALF OF HIMSELF AND OTHERS
SIMILARLY SITUATED, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FOURTH CIRCUIT AND BRIEF IN
SUPPORT OF PETITION

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✓
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✓
CHRISTIE BENET,
IRVINE F. BELSER,
CHARLES B. ELLIOTT,
WILLIAM P. BASKIN,
P. H. McEACHIN,
J. PERRIN ANDERSON,
W. BRANTLEY HARVEY,
EDGAR A. BROWN,
YANCEY A. McLEOD,

Attorneys for Petitioners.



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Supreme Court of the United States

OCTOBER TERM, A. D., 1947

No. -----

CLAY RICE ET AL., PETITIONERS,

versus

GEORGE ELMORE, ON BEHALF OF HIMSELF AND OTHERS
SIMILARLY SITUATED, RESPONDENT

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FOURTH CIRCUIT AND BRIEF IN
SUPPORT OF PETITION**

To the Honorable the Supreme Court of the United States:
Your petitioners respectfully show:

**SUMMARY STATEMENT OF THE MATTER
INVOLVED**

This is a suit in equity brought in the United States District Court for the Eastern District of South Carolina by respondent herein against petitioners herein, sixty citizens of Richland County, South Carolina, for damages, for injunction and for a declaratory judgment, under the provisions of Amendments Fourteen, Fifteen and Seventeen, Sections 2 and 4 of Article I of the United States Constitution, Sections 31 and 43 of Title 8 of the United States Code, subdivision 11 of Section 41 of Title 28 of the United

States Code, subdivision 14 of Section 41 of Title 28 of the United States Code, and Section 400 of Title 28 of the United States Code (Section 274D of the Judicial Code). At the trial the District Court ruled that the matter of damages would be reserved for future decision and the issues confined to the matter of the injunction and declaratory judgment. The trial was by the Court and a decree was rendered in favor of the respondent against petitioners. An appeal from said decree was taken by petitioners to the Circuit Court of Appeals for the Fourth Circuit, which affirmed the decree of the District Court. The petition for rehearing was denied February 6, 1948.

The complaint alleged that the respondent on August 13, 1946, was an elector qualified to vote in the State of South Carolina and on August 13, 1946, presented himself to the regular polling place of Ward 9 Precinct in Richland County and requested ballots and to be permitted to vote in said primary but that the petitioners, who were alleged to be county officers of the Democratic party and managers at the primary, refused to permit the respondent to vote in said primary, solely because of race or color, pursuant to the rules and regulations adopted by the Democratic Party of South Carolina, and that the General Assembly of South Carolina on April 20, 1944, had passed one hundred and fifty (150) Acts repealing all existing laws which contained any reference, directly or indirectly, to the primaries in the State and that the only provision in the Constitution of South Carolina referring to primary elections had been repealed. (R. 6.)

The petitioners filed motion to strike, and without waiving said motion, answered that the District Court was without jurisdiction of the subject-matter of the controversy for the reasons that no substantial Federal question was involved, because:

“(a) The jurisdictional amount does not in reality exist so as to give the Court jurisdiction under Subdivision 1 of Section 41 of Title 28 of the United States Judicial Code; and

“(b) This is not in reality an action to enforce the rights of a citizen to vote so as to give the Court jurisdiction under Subdivision 11 of Section 41 of Title 28 of the United States Judicial Code; and

“(c) The alleged acts complained of were not taken under color of any law, statute, regulation, custom and usage of a State so as to bring the matter within the jurisdiction of the Court under subdivision 14 of Section 41 of Title 28 of the United States Judicial Code; and

“(d) Under Section 400 of Title 28 of the United States Judicial Code, this Court does not have jurisdiction, unless jurisdiction exists under and by virtue of some other section of the Judicial Code, which jurisdiction is expressly denied; said Section 400 does not enlarge the jurisdiction of this Honorable Court.”

Further, the answer alleged as a second defense that the respondent is not entitled to any relief at law or in equity, in that it appears upon the face of the complaint that the Democratic Party of South Carolina is a private voluntary association of individuals, mutually acceptable to each other, and is not created or regulated by virtue of any statute or law, but solely by the rules of said voluntary association; that the plaintiff has not been deprived of any rights, privileges or immunities secured or protected under the Constitution or laws of the United States. It further appears that the complaint fails to state a claim against the defendants upon which relief can be granted.

As a third defense, petitioners denied various allegations in the complaint and alleged that the Constitution of the United States secures to qualified voters within the State of South Carolina the right to cast their ballots only

at the general elections for representatives and senators in the United States Congress; that under the Constitution and laws of South Carolina any qualified elector had the right to cast his ballot in the general election but that under the United States Constitution the Respondent did not have the right to cast his ballot in the primary conducted by the Democratic Party on August 13, 1946, because there was no statute or law in the State of South Carolina requiring or regulating the holding of such primary and that the primary held on August 13, 1946, was no part of the general election. (R. 13.)

The major portion of the testimony in the District Court was embodied in a stipulation by counsel. (R.) Among other things it was stipulated that:

“(a) On June 1, 1944, and April 20, 1947, the General Assembly of South Carolina repealed all existing statutes which contained any reference directly or indirectly to primary elections within the State and that the only constitutional provision in the Constitution of South Carolina mentioning primary elections was effectively repealed on February 14, 1945. (R. 36.)

“(b) Neither the State of South Carolina, nor any of its political subdivisions pays any part whatsoever of the expenses of the conduct of the Democratic Party in South Carolina or of any other political party or of any party primary.

“(c) The Democratic Party of South Carolina, of which the petitioners were county officers and members, is governed wholly by its own rules and regulations.”

The decision of the District Court is reported in 72 F. Supp. 516 (R. 78.)

For Findings of Fact and Conclusions of Law of the District Court, dated July 12, 1947, see R. 100.

For Order of the District Court, dated July 12, 1947, see R. 105.

For decision of Circuit of Appeals, dated December 30, 1947, see R. 114. Petition for rehearing was denied. (R. 135.)

The District Court rendered a declaratory judgment in favor of Respondent and permanently restrained and enjoined the defendants in the cause, the petitioners herein, and their respective successors in office from denying qualified Negro electors the right to vote in Democratic Primary elections in South Carolina solely because of race or color.

For "Points" relied upon by Petitioners in the Circuit Court of Appeals, see R. 106. The major issues presented in the Circuit Court of Appeals were:

(a) *United States v. Classic*, 313 U. S. 299, 85 L. Ed. 1368 and *Smith v. Allwright*, 321 U. S. 647, 88 L. Ed. 987, upon which the District Court pitched its decision, depended upon statutory requirement and regulation of the primary, and inasmuch as in the case at bar, there is no State statute regulating the primary by law, said cases are not applicable to support the decree of the Court.

(b) The Federal Courts are without jurisdiction of this suit because no state action was involved, the defendants in the District Court were not acting under any State statute or law or as State officers or agents, but at the times complained of were acting solely in their capacity as members of the Democratic Party.

(c) The Democratic Party in South Carolina is a voluntary, political association with unrestricted choice of membership, and that the defendants at the times complained of were not acting under color of any State statute or law, but acting solely by virtue of the Rules of the Democratic Party.

(d) The Court should protect the traditional and constitutional rights of the defendants below under the constitutional provision 'peaceably to assemble'. Amendment No. 1 to the United States Constitution.

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code. 28 U. S. C. A. 347 (a):

“(a) In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal.”

The decision of the Circuit Court of Appeals for the Fourth Circuit is dated December 30, 1947. (R. 123.)

THE QUESTIONS PRESENTED

The questions presented are:

A

Whether the United States Circuit Court of Appeals for the Fourth Circuit had jurisdiction to render a declaratory judgment and an injunction permanently restraining and enjoining the petitioners and their successors in office.

B

Whether petitioners, sixty residents and citizens of Richland County, South Carolina, at the times complained of were agents or officers of the State of South Carolina in such manner as to subject them to the jurisdiction of the Federal Court.

C

Whether the Democratic Party of South Carolina is a voluntary, political association, with unrestricted choice of membership.

D

Whether the cases of *Smith v. Allwright*, and *United States v. Classic, supra*, depended upon the statutory requirement and regulation of the primaries and whether inasmuch as in the case at bar there was no statutory requirement or regulation by law of the primary, the said cases are applicable to support the judgment of the Circuit Court of Appeals.

E

Whether petitioners at the times complained of have been deprived of a right secured and protected by Amendment 1 to the United States Constitution or the denial in the decision by the Court below of their right "peaceably to assemble".

F

Whether respondent has a constitutional right to vote in the Democratic primary in the State of South Carolina where the Democratic Party is wholly unregulated by state statutes.

**REASONS RELIED ON FOR THE ALLOWANCE OF
THE WRIT****I**

This case involves "an important question of Federal law, which has not been, but should be, settled by this Court." (Supreme Court Rule 38, par. (5)(b). In *Nixon v. Condon*, 286 U. S. 73, 76 L. Ed. 985, this Court left open the question of the inherent power of a political party when uncontrolled and unregulated by State law to determine its own membership, the Court saying (at page 988):

"Whether a political party in Texas has inherent power today without restraint by any law to determine its own membership, we are not required at this time either to affirm or to deny."

In *Smith v. Allwright*, *supra*, this Court, referring to the *Condon* case, held:

“The question of the inherent power of a political party in Texas ‘without restraint by any law to determine its own membership’ was left open.” (88 L. Ed. p. 994.)

The question there left open has not been determined by any decision of this Court. In the case at bar the primary held on August 13, 1946, was not required, regulated or controlled in any manner by any law in the State of South Carolina. In its decision in the case at bar the Circuit Court of Appeals for the Fourth Circuit held: “It is true, as defendants point out, that the primary involved in *Smith v. Allwright* was conducted under the provisions of state law and not merely under party rules, as in the case here, but we do not think this is a controlling distinction”. This Court has never decided in such circumstance that the primary is an integral part of the election machinery. Nor has this Court decided in such a case that rules promulgated by a political party were not valid. The Circuit Court of Appeals for the Fourth Circuit based its decision on a dictum in *United States v. Classic*, *supra*, and held: “It is pointed out in the case of *United States v. Classic*, *supra*, 313 U. S. 299, that the right to vote in the primary and to have one’s vote counted is to be protected, not only where state law has made the primary an integral part of the procedure of choice, but also where in fact it effectively controls the choice, as is unquestionably true in South Carolina.” This dictum is squarely in conflict with the decision of this Court in *Smith v. Allwright*, *supra*, interpreting the *Classic* decision as holding that the Congressional power to regulate the primary existed only “where the primary is by law made an integral part of the election machinery” and that the decision in the *Classic* case “depended, too, on the de-

termination that under the Louisiana statutes the primary was a part of the procedure for choice of Federal officials."

II

The decision in the Circuit Court of Appeals held that "political parties have become in effect state institutions, governmental agencies through which sovereign power is exercised by the people". And "when these officials participate in what is a part of the state's election machinery, they are election officers of the state *de facto* if not *de jure*, and as such must observe the limitations of the Constitution." In thus holding that the petitioners though acting solely as members and officers of the Democratic Party and not under any state statutes were agents and officers of the State of South Carolina and subject to the restraints of Sections 2 and 4 of Article I of the United States Constitution, and of the Fourteenth, Fifteenth and Seventeenth Amendments, the said Circuit Court of Appeals has decided a "Federal question in a way probably in conflict with applicable decisions of this Court". (Supreme Court Rule 38, par. (5)(b).)

III

In failing to determine that the Courts are under an obligation to protect the constitutional rights of the citizens of South Carolina and the petitioners under the constitutional provision "peaceably to assemble" (Amendment No. 1 to the United States Constitution) the said Circuit Court of Appeals has decided an important Federal question in a way probably in conflict with applicable decisions of this Court. (Supreme Court Rule 38, par. (5)(b).)

IV

The decision of the Circuit Court of Appeals in this case is in conflict with the decision of the Circuit Court of Appeals of the Fifth Circuit in the case of *Chapman v.*

King, 154 Fed. (2d) 460 (Cert. denied), 66 Sup. Ct. 905, 90 L. Ed. 1025, April 1, 1946, wherein it was expressly held that in the absence of statutory regulation making the party an agency of the state, the members of political parties had an unrestricted choice of membership. In that case the Court assumed jurisdiction because of the statutory requirement and regulation of the primaries, but expressly stated that its holding was based upon such statutory regulation and requirement. The Circuit Court of Appeals in the case at bar recognized this conflict and said in reference thereto "while we have great respect for that Court, we are of course not bound by these expressions of opinion."

V

The Circuit Court of Appeals has decided an important question of local law in a way in conflict with applicable local decisions, in that the said Court held that notwithstanding petitioners were not acting under any statutory authority in connection with the said primary "they were election officers of the state *de facto* if not *de jure*; whereas, in the case of *Carolina National Bank v. State of South Carolina* (60 S. C. 465, 38 S. E. 629), the Supreme Court of South Carolina expressly held that:

" * * * If authorized by valid law, the officer's act is the State's act; if not so authorized, the officer's act is his own. * * * The State can only act under its Constitution and through its legislative enactments pursuant thereto."

VI

The decision of the Circuit Court of Appeals is in direct conflict with the decision of the Supreme Court of Arkansas in the case of *Robinson v. Holman*, 181 Ark. 482, 26 S. W. (2d), 66, Arkansas Sup. Ct., March 24, 1930, in which the writ of certiorari was denied by the United States Supreme Court for lack of jurisdiction (282 U. S. 804, 75 L.

Ed. 722), and which expressly held that the right to vote in a Democratic primary where the Democratic primary was not regulated by statute is not protected by the Federal Constitution.

Wherefore, your petitioners pray that a writ of certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals for the Fourth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals for the Fourth Circuit had in the case numbered and entitled on its docket, No. 5664, *Clay Rice et al., Appellants, v. George Elmore, on behalf of himself and others similarly situated, Appellee*, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court of Appeals for the Fourth Circuit be reversed by the Court, and for such further relief as to this Court may seem proper.

CHRISTIE BENET,
IRVINE F. BELSER,
CHARLES B. ELLIOTT,
WILLIAM P. BASKIN,
P. H. McEACHIN,
J. PERRIN ANDERSON,
W. BRANTLEY HARVEY,
EDGAR A. BROWN,
YANCEY A. McLEOD,

Counsel for Petitioners.

Dated March 9., 1948.

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**BRIEF IN SUPPORT OF
PETITION**

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Supreme Court of the United States

OCTOBER TERM, A. D., 1947

No. -----

CLAY RICE *et al.*, PETITIONERS,

versus

GEORGE ELMORE, ON BEHALF OF HIMSELF AND OTHERS
SIMILARLY SITUATED, RESPONDENT

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

THE OPINION BELOW

The opinion of the United States Circuit Court of Appeals for the Fourth Circuit, dated December 30, 1947, is printed in full in the record. (R. 114.)

JURISDICTION

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code (28 U. S. C. 347). Judgment was entered in this case by the United States Circuit Court of Appeals on December 30, 1947. (R. 123.) The

petition for rehearing was denied on February 6, 1948. (R. 135.)

1

The Circuit Court of Appeals has in this case "decided an important question of Federal law, which has not been, but should be, settled by this Court". (Supreme Court Rule 38 (5)(b).) In *Smith v. Allwright*, 321 U. S. 647, 88 L. Ed. 987, this Court, referring to *Nixon v. Condon*, 286 U. S. 73, 76 L. Ed. 985, held: "The question of the inherent power of a political party in Texas 'without restraint by any law to determine its own membership' was left open". (88 L. Ed. 994.) The question there left open has not been settled by any decision of this Court. In the case at bar the primary held on August 13, 1946, was not required, regulated or controlled in any manner by any law in the State of South Carolina. The Circuit Court of Appeals for the Fourth Circuit held: "It is true, as defendants point out, that the primary involved in *Smith v. Allwright* was conducted under the provisions of state law and not merely under party rules, as in the case here, but we do not think this is a controlling distinction." (R. 119.) The Circuit Court of Appeals based its decision on a dictum in *United States v. Classic*, 313 U. S. 299, 85 L. Ed. 1368, and held that the petitioners, defendants in the trial Court, were subject to the constitutional limitations invoked against them "not only where state law has made the primary an integral part of the procedure of choice, but also where in fact it effectively controls the choice, as is unquestionably true in South Carolina." (R. 121.) The *ratio decidendi* of *United States v. Classic*, *supra*, however, is pointedly stated by this Court in *Smith v. Allwright*, *supra*, wherein this Court interpreted the *Classic* decision as holding that the Congressional power to regulate the primary existed only "where the primary is by law made an integral part of the election machinery"

and that the decision in the *Classic* case "depended, too, on the determination that under the Louisiana statutes the primary was a part of the procedure for choice of Federal officials."

2

The Circuit Court of Appeals has in this case "decided an important question of Federal law in a way probably in conflict with applicable decisions of this Court". (Supreme Court Rule 38 (5)(b).) The decision under review holds that the primary involved in *Smith v. Allwright, supra*, was conducted under the provisions of State law and "not merely under party rules, as is the case here, but we do not think this a controlling distinction". The decision is therefore in conflict with the decisions of this Court, particularly *Smith v. Allwright, supra*, in which this Court held "the party takes its character as a state agency from the duties imposed upon it by state statute" * * * "it is state action which compels."

3

The Circuit Court of Appeals has in this case rendered "a decision in conflict with the decision of another Circuit Court of Appeals on the same matter" and "has decided an important question of local law in a way probably in conflict with applicable local decisions". (Supreme Court Rule 38 (5)(b).) The decision of the Circuit Court of Appeals is in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in the case of *Chapman v. King*, 154 Fed. (2d), 460 (Cert. denied), 66 Sup. Ct. 905, 90 L. Ed. 1025, April 1, 1946, which held in effect that in the absence of statutory regulation making the party an agency of the State, members of political parties had an unrestricted choice of membership. The decision of the Circuit Court of Appeals is likewise in conflict with applicable local decisions. In *Carolina National Bank v. State of*

South Carolina (60 S. C. 465, 38 S. E. 629), the Supreme Court of South Carolina held: " * * * If authorized by valid law, the officer's act is the State's act; if not so authorized, the officer's act is his own * * *. The State can only act under its Constitution and through its legislative enactments pursuant thereto."

STATEMENT OF THE CASE

This has already been stated in the preceding petition, which is hereby adopted and made a part of this brief.

SPECIFICATION OF ERRORS

The Circuit Court of Appeals for the Fourth Circuit erred in holding:

Point A

That it had jurisdiction to render a declaratory judgment and injunction, permanently restraining the petitioners and their successors in office for the reason that there was no state action involved, and that the primary was not required by statute and was not an election.

Point B

That the petitioners at the times complained of were agents or officers of the State in such manner as to subject them to the jurisdiction of the Court.

Point C

That the Democratic Party of South Carolina was not a voluntary, political association with unrestricted choice of membership.

Point D

That the decisions in *Smith v. Allwright* and *United States v. Classic, supra*, governed and controlled the case at bar and that the petitioners were subject to the consti-

tutional restraints invoked against them when in fact the primary was conducted "merely under party rules" and not under the provisions of State law.

Point E

That petitioners at the times complained of were not entitled to the protection accorded by Amendment I to the United States Constitution of the right "peaceably to assemble".

Point F

That the respondent has a constitutional right to vote in the Democratic primary in the State of South Carolina where the Democratic party is wholly unregulated by State statute and the primary is conducted merely under party rules.

ARGUMENT

Point A

The District Court and the Circuit Court of Appeals did not have jurisdiction to render a declaratory judgment and injunction permanently restraining the petitioners and their successors in office.

The jurisdictional questions were presented in the District Court by motion and by answer (R. 9, 12), and also preserved in the Circuit Court of Appeals. (R. 107.) The position of petitioners is that the Courts below lacked jurisdiction because there was no state action and because there were no state statutes requiring and regulating the primary as a necessary part of the electoral process.

In *Smith v. Allwright, supra*, the alleged bases of jurisdiction were on the same grounds as stated in the complaint in the cause before the Court and this Court held: "The suit was filed in the District Court of the United States for the Southern District of Texas, which had jurisdiction under Judicial Code Section 24, subsection 14, 28

U. S. C. A., Section 41 (14), 7 FCA, title 28, Section 41 (14)". Jurisdiction was denied by this Court on all other grounds.

The said section is as follows:

"Suits to redress deprivation of civil rights. Fourteenth. Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, or usage, of any State, of any right, privilege, or immunity, secured by the Constitution of the United States, or of any right secured by any law of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States." (Judicial Code, Sec. 24; 28 U. S. C. A. Sec. 41 (14)).

To the same effect is the following section:

"Civil action for deprivation of rights:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." (United States Code, Title 8, Sec. 43, U. S. C. A. 43.)

The Circuit Court of Appeals in the case at bar held that the petitioners at the times complained of were not acting "under the provisions of State law" but "merely under party rules." (R. 119.)

"The party takes its character as a state agency from the duties imposed upon it by state statute.
* * * It is state action which compels." *Smith v. Allwright, supra.*

The decision in the *Classic case, supra*, was placed squarely on the ground that the primary in Louisiana was controlled and regulated by statute in such manner as to make it an essential part of the statutory process of elections. "The Secretary of State is prohibited from placing on the official ballot the name of any person as a candidate for any political party not nominated in accordance with the provisions of the Act." "• • • Misuse of power, **possessed by virtue of state law** and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." (Emphasis added.)

"The decision" (referring to the *Classic case*) "depended, too, on the determination that under the Louisiana statutes the primary was a part of the procedure for the choice of Federal officials." (Italics added.) *Smith v. Allwright, supra*.

"It is state action of a particular character that is prohibited. **Individual invasion of individual rights is not the subject-matter of the Amendment.**" (Emphasis added.) *Civil Rights Cases*, 109 U. S. 3, 27 L. Ed. 836.

In *Barney v. City of New York* (1904), 193 U. S. 430, 48 L. Ed. 737, "complainant's grievance was that the law of the State had been broken, and not a grievance inflicted by action of the legislative or executive or judicial department of the State." The Supreme Court affirmed the judgment of the trial court denying jurisdiction on the ground that no state action was involved.

East St. Louis Railway v. City of East St. Louis, 13 F. (2d) 852, held, relying on the *Barney case, supra*.

"Before an agency of the state can be said to be acting for the state, there must be a law granting it power to act."

In *Snowden v. Hughes*, 321 U. S. 1, 88 L. Ed. 497, this Court held, concurring opinion by Mr. Justice Frankfurter (p. 507), "but to constitute such unjust discrimination the action must be that of the state".

We submit with confidence that the District Court and the Circuit Court of Appeals for the Fourth Circuit lacked jurisdiction to render a declaratory judgment and issue a permanent injunction against the petitioners and that the assumption of jurisdiction for the purposes indicated constituted an unwarrantable and unconstitutional extension of the scope of the statutes conferring jurisdiction on the Federal Courts, and squarely in conflict with the provisions of the Fourteenth, Fifteenth and Seventeenth Amendments and Article I, Sections 2 and 4 of the United States Constitution, which merely prohibit "state action" and not the acts of individuals who are not acting under color of state law.

Point B

The petitioners at the times complained of were not agents or officers of the State.

The Circuit Court of Appeals held (R. 120): "When these officials participate in what is part of the state's election machinery, they are election officers *de facto* if not *de jure* and as such must observe the limits of the Constitution". But the same Court also held that the primary involved in the case at bar was conducted "merely under party rules" and not "under the provisions of state law."

Petitioners respectfully submit that the Court overlooked and disregarded the uniform decisions of the Supreme Court of the United States, all of which hold that a primary has been deemed a state agency only when regulated and required by state statute. The Court overlooked and disregarded the express holding in *Smith v. Allwright*, *supra*, that

"The party takes its character as a state agency from the duties imposed upon it by state statutes; * * * it is state action which compels."

"But to constitute such unjust discrimination the action must be that of the state". *Snowden v. Hughes*, *supra*.

And, likewise, the Court overlooked and disregarded the law in South Carolina as stated by the Supreme Court of that State:

"* * * If authorized by valid law, the officer's act is the State's act; if not so authorized, the officer's act is his own." *Carolina National Bank v. State of South Carolina* (60 S. C. 465, 38 S. E. 629).

Point C

The Democratic Party of South Carolina at the times complained of was a voluntary political association with unrestricted choice of membership. The uncontradicted evidence conclusively shows that the Democratic Party and the Democratic primary in South Carolina are wholly unregulated by statute.

The Circuit Court of Appeals held that

"The use of the Democratic Primary in connection with the general election in South Carolina provides, as has been stated, a two step election machinery for that state; * * *."

This language, we submit, does not square with the record in the case, the stipulation of facts (R. 33) which establish that no primary is required by any statute of the State of South Carolina. Indeed the same Court held (R. 119) that the primary involved in the case at bar was conducted merely "under party rules" and not "under the provisions of state law".

"The party takes its character as a state Agency from the duties imposed upon it by state statutes;

• • • it is state action which compels". *Smith v. Allwright, supra.*

Point D

The decisions in *Smith v. Allwright* and *United States v. Classic, supra*, depended on the determination that under the statutes involved the primary was required, regulated and controlled in such manner as to make it a part of the election process.

How can the quoted language from the decision of the Circuit Court of Appeals of the Fourth Circuit square with the holding in *Smith v. Allwright, supra*, that

"The party takes its character as a state agency from the duties imposed upon it by state statutes; it is state action which compels".

and that

"the decision in the *Classic case* depended, too, on the determination that under the Louisiana statutes, the primary was a part of the procedure for choice of Federal officials." (88 L. Ed. 995.)

Point E

The petitioners are entitled to the protection accorded by Amendment I to the United States Constitution of the right "Peaceably to Assemble".

"The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental. The Constitution does not confer the right, but guarantees its free exercise. The right of the people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution of the United States. It is and always has been one of the attributes of citizenship under a free government, and is found wherever civilization exists. The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation, with respect to public affairs and to petition for

a redress of grievances". 11 Am. Jur., Constitutional Law, Sec. 325, p. 1119.

"The application of the constitutional right of assembly and petition has affected, for the most part, political administration and election legislation. It has been held that a political convention is an assemblage within the meaning of constitutional provisions guaranteeing the right of peaceable assembly and petition and that a statute declaring that candidates for judicial and educational offices shall not be nominated, endorsed, recommended, criticized, or referred to in any manner by any political party, convention, or primary violates such constitutional provisions. The right to sign and circulate a petition for the impeachment of a public officer is likewise safe-guarded by these constitutional provisions. The right of assemblage, however, does not in any way prevent the enactment of uniform primary laws, under which, in lieu of congregating at caucuses and conventions and selecting delegates that represent them, the voters may assemble at the polls in the different polling places and there express their choice of candidates." 11 Am. Jur., Constitutional Law, Sec. 325, p. 1121.

"The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental". *De Jonge v. Oregon*, 299 U. S. 353, 364, 81 L. Ed. 278.

In discussing the freedom of the press and its necessity in a democracy, Jefferson said: "Our liberty depends on the freedom of the press, and that cannot be limited without being lost." A fortiori it would seem that freedom of association for political purposes must be as unrestricted as freedom of the press.

Point F

The respondent did not have the constitutional right to vote in the Democratic Primary in the State of South Carolina and the Court erred in so holding because at the times

complained of the primary was not required, regulated or controlled by any State statute or law but was conducted "merely under party rules."

No decision of this Court sustains the right of the respondent to vote in a preferential primary when such primary is conducted not under the "provisions of state law", but "merely under party rules".

No decision of this Court holds that a preferential primary conducted not under the "provisions of state law" but "merely under party rules, as is the case here" is a step in the election process.

No decision of this Court holds that the petitioners at the times complained of were officers or agents of the State of South Carolina.

"The State can only act under its Constitution and through its legislative enactments pursuant thereto". *Carolina National Bank v. State of South Carolina, supra.*

"But to constitute such unjust discrimination the action must be that of the state." *Snowden v. Hughes, supra.*

"The party takes its character as a state agency from the duties imposed upon it by state statutes;
* * * it is state action which compels." *Smith v. Allwright, supra.*

"The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by law make or alter such Regulations, except as to the Places of choosing Senators." Article I, Section 4, Clause 1 of the United States Constitution.

The record conclusively establishes and the Circuit Court of Appeals held that the Legislature of South Caro-

lina had expressly repealed all statutes regulating or controlling primaries and that the only provision in the State Constitution dealing with primaries had been repealed and that the primary in the case at bar was conducted not under the "provisions of state law" but "merely under party rules". (R. 119.)

"We there held that Section 4 of Article 1 of the Constitution authorized Congress to regulate primary as well as general elections * * * where the primary is by law made an integral part of the election machinery". (Emphasis added.) *Smith v. Allwright*, *supra* (88 L. Ed. 995.)

CONCLUSION

The *ratio decidendi* of the *Smith-Allwright* and *Classic cases*, *supra*, is that where the statutes of the state have made the electoral process consist of two necessary steps, one, the primary, and two, the general election, then the right to vote in the primary is equally protected with the right to vote in the general election. It is clear that the respondent's exclusion from voting in the primary was wholly a result of party action and not of state action, because the record shows that in South Carolina there is no legal requirement that a primary must be held before a general election, and therefore there is no two-step process. In its opinion the District Court held that there is now no statutory control either civil or criminal of the Democratic primary and that the Democratic party is no longer governed by State statutes, and further, that there is now no law in South Carolina, in its Constitution or on its statute books, governing primaries. (R. 85.)

In its opinion the Circuit Court of Appeals of the Fourth Circuit held:

"It is true, as defendants point out, that the primary involved in *Smith v. Allwright* was conducted under the provisions of state law **and not merely under party rules, as is the case here**, but we do not think this a controlling distinction." (Emphasis added.) (R. 119.)

It is clear that the judgment under review does not square with the decisions of this Court and denies the sixty petitioners, who were defendants in the District Court, the constitutional rights both with respect to their right "peaceably to assemble" and with respect to the rights reserved under the Tenth Amendment to the United States Constitution.

The Court is not here concerned with a question of policy but with a question of constitutional power. Since at the times complained of by the respondent, no statute of the State of South Carolina regulated or controlled the primaries, no provision of the Constitution or statute invoked in the case at bar can be soundly held under the uniform decisions of this Court to have deprived the petitioners of their right as free men in a democracy to develop their faculties of thought and to participate in the activities of a political party to the end that the deliberative forces should prevail over the arbitrary. The assumption of petitioners soundly supported, as we believe, by the provisions of the United States Constitution, is that at the times complained of they had the freedom to think as they willed and to express their thought as a means indispensable to the discovery and spread of political truth.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory

powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

CHRISTIE BENET,
IRVINE F. BELSER,
CHARLES B. ELLIOTT,
WILLIAM P. BASKIN,
P. H. McEACHIN,
J. PERRIN ANDERSON,
W. BRANTLEY HARVEY,
EDGAR A. BROWN,
YANCEY A. McLEOD,

Attorneys for Petitioners.

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CHARLES ELMORE GOSPL
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1947

No. 668

CLAY RICE, ET AL.,
Petitioners,

v.

GEORGE ELMORE, ON BEHALF OF HIMSELF AND OTHERS
SIMILARLY SITUATED,
Respondent.

**RESPONDENT'S BRIEF IN OPPOSITION TO
PETITION FOR CERTIORARI**

↓ THURGOOD MARSHALL,
↓ WILLIAM R. MING, JR.,
Attorneys for Respondent.

↓ HAROLD R. BOULWARE,
EDWARD R. DUDLEY,
↓ MARIAN W. PERRY,
Of Counsel.



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STATEMENT OF THE CASE

Petitioners in their petition and brief have correctly cited the case below and have properly indicated the basis for jurisdiction. In their statement of facts, however, they have omitted certain matters.

As the court below found:

"For half a century or more the Democratic Party has absolutely controlled the choice of elective officers in the State of South Carolina. The real elections within that state have been contests within the Democratic Party, the general elections serving only to ratify and give legal validity to the party choice. So well has this been recognized that only a comparatively few persons participate in the general elections. In the election of 1946, for instance, 290,223 votes were cast for Governor in the Democratic primary, only 23,326 in the general election." (R. 115)

Despite the fact that in 1944 the General Assembly of South Carolina repealed all existing statutes which contained any reference directly or indirectly to primary elections within the state, the District Judge expressly found:

"In 1944 substantially the same process was gone through, although at that time and before the State Convention assembled, the statutes had been repealed by action of the General Assembly, heretofore set out. The State Convention that year adopted a complete new set of rules and regulations, these however embodying practically all of the provisions of the repealed statutes. Some minor changes were made but these amounted to very little more than the usual change of procedure in detail from year to year. * * * (R. 94)

"In 1946 substantially the same procedure was used in the organization of the Democratic Party and another set of rules adopted which were substantially the same as the 1944 rules, excepting that the voting age was lowered to 18 and party officials were allowed the option of using voting machines, and the rules relative to absentee voting were simplified * * *." (R. 95)

REASONS FOR DENYING THE PETITION

When the courts below upheld the right of respondent, a qualified elector, to participate in the choice of congressmen in South Carolina, they properly applied the relevant provisions of the Constitution and laws of the United States as construed by this Court. They readily and rightly recognized that the question was one which has already been "settled by this court * * *." Therefore, we submit, the petition for writ of certiorari should be denied.

This Court pointed out in *United States v. Classic*, 313 U. S. 299, 314, that ever since *Ex parte Yarbrough*, 110 U. S. 651, it has uniformly held that under Article I, Sec. 2 of the Constitution the right to choose congressmen "is a right established and guaranteed by the Constitution and hence is one secured by it to those citizens and inhabitants of the state entitled to exercise the right."

This Court made it equally plain in the *Classic* case that the constitutional protection of the right to vote extended to certain primary elections when it said:

"Where the state law has made the primary an integral part of the procedure of choice, or where in fact the primary effectively controls the choice, the right of the elector to have his ballot counted at the primary is likewise included in the right protected by Article I, Sec. 2. And this right of participation is protected just as is the right to vote at the election, where the primary is by law made an integral part of the election machinery, whether the voter exercises his right in a party primary which invariably, sometimes or never determines the ultimate choice of the representative. Here, even apart from the circumstance that the Louisiana primary is made by law an integral part of the procedure of choice, the right to choose a representative is in fact controlled by the primary because, as is alleged in the indictment, the choice of candidates at the Democratic primary determines the choice of the elected representative. Moreover, we cannot close our eyes to the fact, already mentioned, that the practical influence of the choice of candidates at the primary may be so great as to affect profoundly the choice at the general election, even though there is no effective legal prohibition upon the rejection at the election of the choice made at the primary, and may thus operate to deprive the voter of his constitutional right of choice." (313 U. S. 299, 318-319.) Italics supplied.

The record in the instant case shows, without dispute, that the Democratic primary in South Carolina "effectively controls the choice" of congressmen and has done so for nearly fifty years (R. 103-104). Equally clearly the record shows that petitioners prevented respondent, and others similarly situated, solely on account of his race and color, from exercising his constitutional right to participate in the choice of congressmen in the 1946 Democratic primary.

This Court held in the *Classic* case that Secs. 19 and 20 of the Criminal Code (Title 18 Secs. 51 and 52) provided crim-

inal sanctions for interference with the right to vote in the Louisiana primary. We submit that the courts below rightly held that Title 8, Secs. 31 and 43 and the provisions of Title 28, Secs. 41 (1), (11), (14), and 400 similarly afford respondent a civil remedy in the federal courts for deprivation of his right to vote in the South Carolina primary.

In support of their plea for certiorari petitioners claim, primarily, that there was no "state action" here. Even accepting that assumption *arguendo* and only for the moment, this neither justifies petitioners' interference with respondent's right to vote nor does it require this Court to review the decision below. In the *Classic* case, *supra*, this Court was explicit on the point. There it was said:

Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted at Congressional elections. This Court has consistently held that this is a right secured by the Constitution. *Ex parte Yarbrough, supra*; *Wiley v. Sinkler, supra*; *Swafford v. Templeton, supra*; *United States v. Moseley, supra*; see *Ex parte Siebold, supra*; *In re Coy*, 127 U. S. 731; *Logan v. United States*, 144 U. S. 263. And since the constitutional command is without restriction or limitation, the right, unlike those guaranteed by the Fourteenth and Fifteenth Amendments, is secured against the action of individuals as well as of states. *Ex parte Yarbrough, supra*; *Logan v. United States, supra*. (313 U. S. 299, 315.)

Thus it appears to be well settled by the decisions of this Court that the paramount right of a free people to choose those persons to whom the powers of government are to be entrusted is protected by the Constitution from interference by individuals as well as by states. Petitioners take nothing by their claim that their actions were done pursuant to the "rules" of a "voluntary political association." They deliberately and admittedly so acted as to prevent qualified electors from exercising their constitutional right to vote. The courts below, then, followed the decisions of this Court

in holding that the petitioners thus violated the Constitution and laws of the United States.

Petitioners confuse the rights protected by Article I, Sec. 2 of the Constitution with those protected by the Fourteenth and Fifteenth Amendments. That confusion is understandable. The whole course of official conduct in South Carolina beginning with then Governor Johnston's speech when he called a special session of the Legislature in 1944 * was to evade if possible, or to violate if necessary, the express limitations of the Fourteenth and Fifteenth Amendments. It was admittedly the intention of the governor and the legislature to deprive all Negroes of their right to vote in the Democratic primary. Small wonder, then, that petitioners, fully aware of this scheme, are preoccupied with the Fourteenth and Fifteenth Amendments. We submit, however, that it is at their peril that they ignore the protection afforded *all* qualified electors by Article I, Sec. 2 of the Constitution.

We agree with petitioners that since the decision of the Civil Rights Cases, 109 U. S. 3, this Court has held that the Fourteenth and Fifteenth Amendments apply only when there is "state action." And, the courts below, relying on the decisions of this Court, found that it was the State of South Carolina, acting through petitioners, which denied respondent the right to vote. Thus respondent was entitled to, and has been afforded, the protection of the Civil War Amendments as well as the protection of Article I of the Constitution.

It cannot be denied that it is a function of the state to conduct elections for state and federal officers and the state of South Carolina, of course, performs that function. As the courts below found, in South Carolina the selection of officers of government is a two-step process with the primary the first step and the general election the second. Each

* See Exhibit C to original Complaint, which is admitted to be accurate and correct (R. 37).

step, however, is an essential part in the process of selecting the officers of government. This is so in South Carolina whether the first step, the primary, is conducted pursuant to statutes or to the rules of a political party, and the courts below properly so held.

As the court below pointed out, when the officers of the Democratic Party

“participate in what is a part of the state’s election machinery they are electing officers of the state *de facto* if not *de jure*, and as such must observe the limitations of the Constitution. Having undertaken to perform an important function relating to the exercise of sovereignty of the people, they may not violate the fundamental principles laid down by the Constitution for its exercises.”

That conclusion was required by the decision of this Court in the *Classic* case since “in fact the primary effectively controls the choice.”

In other cases, this Court has recognized that it is not the symbols and trappings of officialdom which determine whether the Fourteenth and Fifteenth Amendments apply but rather whether the facts of the particular case disclose the exercise of the state’s authority. For example, in *Marsh v. Alabama*, 326 U. S. 501, this Court held that the Fourteenth Amendment operated on the private owner of a “company town” to protect the right of freedom of speech. Labor unions, although private voluntary associations, have been held by this Court subject to the limitations of the due process clause of the Constitution when exercising power conferred by the federal government. *Steele v. Louisville and Nashville RR*, 323 U. S. 192, *Tunstall v. Brotherhood of Locomotive Firemen*, 323 U. S. 210. Similarly the Fourth Circuit in *Kerr v. Enoch Pratt Free Library*, 149 F. (2d) 212,* held that where a corporation had invoked the power

* Certiorari denied, 326 U. S. 721.

of the state for its creation and relied upon city funds for its operation it was in fact a state instrumentality.

As this Court declared in *Smith v. Allwright*, 321 U. S. 649, 664-665:

"When primaries become a part of the machinery for choosing officials, state and national, as they have here, the same tests to determine the character of discrimination or abridgement should be applied to the primary as are applied to the general election. If the State requires a certain electoral procedure, prescribes a general election ballot made up of party nominees so chosen and limits the choice of the electorate in general elections for state offices, practically speaking, to those whose names appear on such a ballot, it endorses, adopts and enforces the discrimination against Negroes, practiced by a party entrusted by Texas law with the determination of the qualifications of participants in the primary. This is state action within the meaning of the Fifteenth Amendment. *Guinn v. United States*, 238 U. S. 347, 362.

"The United States is a constitutional democracy. Its organic law grants to all citizens a right to participate in the choice of elected officials without restriction by any State because of race. This grant to the people of the opportunity for choice is not to be nullified by a State through casting its electoral process in a form which permits a private organization to practice racial discrimination in the election. Constitutional rights would be of little value if they could be thus indirectly denied. *Lane v. Wilson*, 307 U. S. 268, 275.

"The privilege of membership in a party may be, as this Court said in *Grovey v. Townsend*, 295 U. S. 45, 55, no concern of a State. But when, as here, that privilege is also the essential qualification for voting in a primary to select nominees for a general election, the State makes the action of the party the action of the State."

Prior to the action of the South Carolina Legislature in repealing more than 150 statutes governing the conduct of the primary in that state there was no doubt that under the

decision in *Smith v. Allwright, supra*, respondent had a right to participate in the Democratic primary. The court below expressly found that in fact the relationship between the Democratic primary and the process of the selection of the officers of government was unchanged by the repeal of the statutes (R. 103). Under these circumstances, we submit, petitioners continued to exercise the power of the state in carrying on the election of representatives. In so doing they were bound by the limitations of the Fourteenth and Fifteenth Amendments and in accordance with the decisions of this Court the courts below properly so held.

Petitioners claim that the decision of the court below is inconsistent with that of the Fifth Circuit in *Chapman v. King*, 154 F. (2d) 460. In that case, relying on *Smith v. Allwright, supra*, the court upheld the right of a Negro voter to participate in the Georgia Democratic primary. At most it can be said that there is dicta in the opinion in *Chapman v. King*, 154 F. (2d) 460, 463, which is inconsistent with the decision of the court below in the instant case. When a decision is consistent with the decisions of this Court a difference in dicta in the opinion of another Circuit Court of Appeals is not, we submit, ground for granting a writ of certiorari. Particularly is that true when, as here, the decisions of the two courts are consistent with each other and the rulings of this Court.

Similarly, the petitioners seek to bolster their plea by claiming that the court below has decided an important question of "local law" in a way probably in conflict with applicable local decisions. The court below construed and applied the relevant provisions of the Federal Constitution and statutes. By definition the limitations of the Constitution of the United States are not "local" in character. Therefore *Carolina National Bank of Columbia v. State*, 38 S. E. 629, has no application. It is for the federal courts, not the Supreme Court of South Carolina, to decide whether there has been "state action" within the meaning of the Fourteenth Amendment. We submit that it has already

been demonstrated that the decision of the court below was consistent with the decisions of this Court in that regard.

Petitioners also contend that the decision of the Court below interferes with their right peaceably to assemble and thus contravenes the First Amendment to the Constitution. This contention is as spurious as it is novel. The actual "right" which petitioners assert is the absolute authority to deprive Negroes in South Carolina of the effective exercise of their "right to choose members of the House of Representatives." The record in this case shows plainly that in conducting the primary election in the State of South Carolina the Democratic Party is not a group of individual citizens assembling peaceably to secure redress for grievances. It is an organization carrying on a part of the function of the state government to select representatives and senators to sit in the Congress of the United States and it is to that activity to which the court below applied the Constitutional limitations. In any event, petitioners' right to assemble cannot be so exercised so to deprive respondent of his right to vote and this Court so held in *Smith v. Allwright*, *supra*.

CONCLUSION

In *Lane v. Wilson*, 307 U. S. 268, 275, this Court pointedly declared that the Fifteenth Amendment nullifies "sophisticated as well as simple-minded modes of discrimination." Characterization of the South Carolina device to achieve the disfranchisement of Negroes seems hardly necessary. The record in this case shows plainly and without contradiction that the processes of that state have been subverted to achieve a result forbidden by the Constitution of the United States. Both the District Court and the Circuit Court of Appeals recognized this and so held. That decision is consistent with the applicable decisions of this Court. We submit, therefore, that no grounds exist here to warrant issu-

ance of a writ of certiorari by this Court and we urge denial of the petition.

Respectfully submitted,

THURGOOD MARSHALL,
WILLIAM R. MING, JR.,
Attorneys for Respondent.

HAROLD R. BOULWARE,
EDWARD R. DUDLEY,
MARIAN W. PERRY,
Of Counsel.